Appeals in a Foreclosure Case, an Empty Right in Ohio?

Foreclosure cases often proceed without participation or significant defense by the obligor / mortgagor because that party is without both any defense and any funds to pay counsel. That happened in *Green Tree Servicing v. Asterino-Starcher, et al.*, 2018-Ohio-977 (Franklin Cty. App., March 15, 2018). In *Green Tree Servicing*, as sometimes occurs, a junior lienor had the motivation and resources to contest the foreclosure.[1]

After losing at the trial court, the junior lienor appealed and sought to stay the foreclosure sale. A stay was granted, if the junior lienor posted a bond. No bond was posted. So, the property was sold and the sale proceeds were distributed to the plaintiff / mortgagee; presumably the plaintiff won the property using a credit bid. The junior lienor appealed.

Rejecting the plaintiff / mortgagee's argument, the *Green Tree Servicing* court determined that the judicial sale and proceeds distribution did not moot the junior lienor's appeal[2]. Specifically, the appellate court held that Ohio Revised Code Section 2329.45 permitted the fashioning of a remedy despite the finality of judicial sales. Relevant portions of that statute read:

Former R.C. 2329.45 provided as follows:

If a judgment in satisfaction of which lands, or tenements are sold, is reversed, such reversal shall not defeat or affect the title of the purchaser. In such case restitution must be made by the judgment creditor of the money for which such lands or tenements were sold, with interest from the day of sale.

If a judgment in satisfaction of which lands or tenements are sold is reversed on appeal, such reversal shall not defeat or affect the title of the purchaser. In such case restitution in an amount equal to the money for which such lands or tenements were sold, with interest from the day of sale, must be made by the judgment creditor. In ordering restitution, the court shall take into consideration all persons who lost an interest in the property by reason of the judgment and sale and the order of the priority of those interests.

According to the *Green Tree Servicing* court: "[t]he new language further clarifies that **A MORTGAGOR, JUNIOR LIENHOLDER, OR OTHER PERSON WITH AN INTEREST IN PROPERTY RETAINS A**

REMEDY AFTER SALE of the subject property, despite the irrevocable nature of a judicial sale."

On its face, Section 2329.45 could require a successful credit bidding judgment creditor to pay "restitution" of money that it never received from the sale proceeds.[3] Cases hold, however, that a credit bidder may meet its obligation under Section 2329.45 by transferring the property back to the mortgagor. See, *Fannie Mae v. Hicks*, 77 N.E.3d 380 (Cuyahoga Cty. App. 2016) wherein the reversal winning mortgagor sought money from a previously successful credit bidding creditor. Denying that request, the *Hicks* court followed prior decisions stating that:

First, that the former R.C. 2329.45 operates to protect the title of a third-party purchaser, not a party purchaser, where the judicial sale occurs prior to the reversal of a foreclosure order. Second, that the former R.C. 2329.45 does not operate to provide restitution to the defendant-debtor when the purchaser is not a third party. And finally, that reversal of a foreclosure order in such instances operates, as a matter of law, to set aside, vacate, and nullify the sale of the property.

While the *Green Tree Servicing* court permitted the junior lienor's appeal to continue despite the fact that the sale was not stayed and proceeds were distributed, the *Green Tree Servicing* court did limit the junior creditor's appeal to issues that were not personal to the mortgagee saying **"[A] FORECLOSURE PROCEEDING IS A TWO-STEP PROCESS INVOLVING, FIRST, THE ENFORCEMENT OF A DEBT OBLIGATION, AND, SECOND, THE CREDITOR'S RIGHT TO COLLECT AGAINST THE SECURITY GIVEN BY THE BORROWER FOR THAT DEBT**. . . . There is reason to distinguish the action on the note from the ensuing action against the associated collateral. The first claim involves only the maker of the note and the person entitled to enforce it. The second joins all those with an interest in the mortgaged property. Thus, the junior lienholders are truly strangers to the action on a note, which could proceed without them. They have no standing to challenge the plaintiff creditor's standing and, here, cannot assert a defense to the note obligation that the obligor herself has failed to raise."

The *Green Tree Servicing* court admits that other Ohio appellate courts do not permit an appeal to proceed if the foreclosure sale has not been stayed,

usually with an accompanying appellate bond. See, 69 O. Jur.3d Section 404 titled "Effect of Reversal of Judgment" which states:

Some Ohio courts have held that R.C. 2329.45 does not preserve a remedy for a mortgagor appealing from a foreclosure judgment, for purposes of determining whether the appeal is moot after the mortgaged property is sold at the sheriff's sale and the proceeds distributed, unless the mortgagor seeks a stay of the distribution of the sale proceeds. However, there seems to be a split of authority on the issue as several appellate districts in Ohio have construed R.C. 2329.45 as preserving a remedy for mortgagors in foreclosure actions even after the property has been sold and the proceeds of the sale have been distributed.

The *Green Tree Servicing* case is from Franklin County and in disagreement with cases from Ohio's two other largest counties: *Art's Rental Equipment v. Bear Creek Construction*, 2012-Ohio-5371 (Hamilton Cty. App. Nov. 21, 2012)[4] (appeal by non-mortgagee lienors who failed to get a stay to prevent foreclosure sale and distribution of proceeds was moot); and *Blisswood Village Home Owners Ass'n v. Genesis Real Estate Holdings Group, LLC*, 2018-Ohio-1517 (Cuyahoga Cty. App. April 19, 2018) (the remedy provided in section 2329.45, quoted above, is only available "when the appealing party sought and obtained a stay of the distribution of the [foreclosure sale] proceeds." Citing cases prior to the statute's amendment discussed above).

The *Green Tree Servicing* case has not been cited or discussed in a reported decision as of this writing. It remains to be seen if the 2016 amendment to Section 2329.45 will result in appeals being permitted to proceed as suggested therein. Unless that happens: a mortgagor really has no appeal rights because if she had funds to post a bond, there probably would be no foreclosure case; and lienors whose often modest-sized liens might be junior to plaintiff's mortgage face an untenable choice because they must post a bond that is often much greater than the debt they are trying to collect.